

OCT 5 1978

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

Term, 1978

No. **78-569**

UNITED STATES OF AMERICA,

v.

JOHN PATTON, a/k/a BUNCIE,

Petitioner.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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Petitioner.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

The Petitioner, John Patton, respectfully prays that a Writ of Certiorari issue to review the judgment and judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 8, 1978.

Opinion Below

The Opinion of the Court of Appeals, holding that a Court may disregard the mandate of 18 U.S.C. 3500 is unreported and is attached hereto as Appendix "A".

Jurisdiction

The Court of Appeals order denying the Petition for Re-hearing is attached hereto as Appendix "B", and was filed on September 5, 1978. This Petition is filed within thirty (30) days of that date pursuant to Rule 22(2) of the United States Supreme Court.

The Court's jurisdiction is invoked under Title 28, United States Code Section 1254(1).

The District Court's jurisdiction was invoked by the Government under Title 21, United States Code § 846, § 841(a)(1), § 843(b).

Questions Presented

1. Was it error for the Court to refuse to grant a mistrial, or, in the alternative, to strike the testimony of two (2) Government Agents where the prosecution failed to supply defense counsel with the Grand Jury testimony of each of the Agents pursuant to the "Jencks Act" (18 U.S.C.A. 3500, attached hereto as Appendix "C"), which denied the Defendant the ability to effectively cross-examine the Government Agents?

2. Was it error for the Court to refuse Defense Motion to Strike the Testimony of Government Witness, Archie Patrick, where multiple "debriefings" of Mr. Patrick were tape-recorded and the tape recordings subsequently destroyed by the Government in violation of the "Jencks Act"?

3. Was the Appellant, Frank Dattalo, prejudiced by the closing remarks of the prosecutor, Mr. Charles Caruso?

Statement of Case

Following an investigation, the Drug Enforcement Administration of the United States sought an indictment against the Petitioner-Appellant, Frank Dattalo, and others, including one (1) Martel Inmon. On July 14, 1976, Agent Richard Weatherbee of the Drug Enforcement Administration appeared before a Federal Grand Jury seeking an indictment. He testified to facts and opinions concerning the subject matter of the investigation and summarized testimony of various Government witnesses for consideration by the Grand Jury.

The Grand Jury returned a true bill on July 14, 1976, in precisely the same form as presented to the Grand Jury by Agent Weatherbee.

The superseding indictment was secured on September 24, 1976, which changed certain dates and individuals in various counts of the original indictment. The original indictment was subsequently dismissed.

Also, on July 14, 1976, the date of the original indictment, Drug Enforcement Administration Agent Roy Upton appeared before the same Federal Grand Jury and in the same manner as Agent Weatherbee, secured an indictment against a number of individuals, one (1) of whom was the same Martel Inmon named in the indictment with the Petitioner-Appellant, John Patton.

Prior to the commencement of the trial, the attorneys for the Government and for the defense agreed to a "*de facto* Jencks procedure", to-wit, that all Jencks material would be delivered to defense counsel twenty-four (24) hours prior to each of the Government's witnesses being called to testify. This procedure was agreed to in an effort to expedite the trial and minimize the delays usually encountered while defense counsel review Jencks material.

At all times throughout the presentation of the Government's case, the defense believed that it had all the material that fell within the confines of the Jencks Act, as to each witness called to testify by the Government. The defense was assured of this by the Government's attorneys and by the Court's action in directly ordering the Government to comply with the Jencks Act. The Government did not provide defense counsel with the Grand Jury testimony of Agents Upton or Weatherbee, nor did the Government submit the Grand Jury testimony to the Court for review to determine whether or not the Grand Jury testimony was properly producible under the Jencks Act.

During the testimony of one (1) of the Government informants, it became apparent that the superseding indicting Grand Jury may not have been properly informed of the conflicting statements given by the informant. The defense raised the issue of prosecutorial misconduct in the securing of the indictment based upon testimony elicited from the informant. The defense requested an immediate evidentiary hearing on the issue, but the Government opposed the hearing at that stage in the trial, arguing that it was unwarranted discovery. The Court ordered that issue to be preserved until the close of the Government's case, at which time, a hearing would be held on the Motion.

The trial continued with the Agents' Grand Jury testimony locked in the Government's file until the close of the Government's case. After resting, the Government delivered to defense counsel copies of the July 14, 1976 Grand Jury testimony of Agents Upton and Weatherbee.

During the course of the trial, both Agents Weatherbee and Upton testified on numerous occasions to each phase of the investigation just as both had done before the Grand Jury. Agent Weatherbee was called to the stand approximately twenty-nine (29) separate times, and Agent Upton was called approximately thirteen (13) separate times.

Upon discovering who the witnesses were before the Grand Jury and reading the content of their Grand Jury testimony, the defense raised a violation of the Jencks Act and moved for a mistrial, or in the alternative, that the testimony of now-disclosed witnesses before the Grand Jury, Agents Upton and Weatherbee, be stricken and the case continued. The Court refused the Motion. However, the Court did recognize the transgression of the Jencks Act, and suggested to the Government it move to open its case and tender the two (2) witnesses, Upton and Weatherbee, for further cross-examination by the defense. The split cross-examination was not agreed to by the defense on the grounds that the Jencks Act made no provision for such a procedure. The Court refused to grant a mistrial and ordered the trial to continue without striking the Agents' testimony.

The second issue presented arises out of the testimony of another Government witness, one (1) Archie Patrick, an informant who was used by the Government to purchase heroin from Martel Inmon. During the course of the investigation, Mr. Patrick was "debriefed" by Agents on numerous occasions, during which "debriefings" a tape recorder was used to record Mr. Patrick's statement. The Government Agents did not have the verbatim tape-recorded "debriefing" sessions transcribed. Rather, they made their own notes of the information given to them by Mr. Patrick in each of the "debriefing" sessions and then destroyed the tape recordings. During the course of cross-examination of Agent Upton, it was learned that the Government Agents became aware that Mr. Patrick was not only purchasing heroin and delivering it to the Government, but that he was also purchasing heroin from Mr. Inmon and selling it for personal profit. These purchases and sales for a profit occurred while Mr. Patrick was being paid a monthly stipend of \$700 by the Government for his co-operation.

Under cross-examination, Agent Upton admitted that although they learned of Mr. Patrick's illegal conduct while working as a Government operative, and discussed it in the "debriefing" sessions, they elected not to include that information in any of their notes of the "debriefing" sessions. The defense moved to strike Mr. Patrick's testimony based upon the destruction of the verbatim tape-recorded statements of Mr. Patrick. The Motion was denied by the Court.

The final issue arises out of the following statement made to the jury by Government Attorney Charles Caruso in his rebuttal remarks following the closing remarks of the defense:

Mr. Caruso: Ladies and gentlemen, let me suggest, that if justice isn't done in this case, if these people walk out without paying their due, there has been a swindle on this jury and on this system we all believe in.

Notice of Appeal was filed on February 24, 1978.

The Court of Appeals filed their Judgment Order on August 7, 1978, affirming the judgment of the Court below.

On August 16, 1978, Petitioner filed a Petition for Rehearing.

On September 5, 1978, the Court of Appeals for the Third Circuit filed its Order denying the Petition for Rehearing.

The Mandate of the Court of Appeals has been denied by Order of September 29, 1978.

Reasons for Granting Writ

1. The Opinion of the United States Court of Appeals for the Third Circuit was filed on August 7, 1978, affirming the judgment of the District Court.

2. The Appellant believes that the Court erred in not addressing itself to the questions as follows:

A. (1) The refusal of the Government to submit, for purposes of cross-examination, the Jencks material (the Grand Jury testimony) was such that the Defendant-Appellant was unable to effectively cross-examine the Government Agents in order to exonerate himself.

(2) By refusing to consider this question and affirming the District Court, the Third Circuit Court is now in conflict with two (2) of its prior decisions, both of which are in conflict with the instant case, to-wit, *United States v. Clark*, 346 F.Supp. 428 (E.D. Pa. 1972); affirmed, 475 F.2d 1396 (3rd Cir. 1973); and *United States v. Prince*, 264 F.2d 850 (3rd Cir. 1959).

(3) The Circuits are divided as to this issue and clarification is needed.

Conclusion

For the foregoing reasons, it is respectfully requested that this Court grant a Writ of Certiorari and reverse the decision of the Court of Appeals.

Dated:

JOHN L. DOHERTY, ESQUIRE,
Attorney for Petitioner.

APPENDIX "A"

Judgment Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1289

UNITED STATES OF AMERICA,

vs.

PATTON, JOHN a/k/a Buncie
John Patton,*Appellant.*

Appeal from the United States District Court
for the Western District of Pennsylvania
(D. C. Crim. No. 76-141-1)

Submitted Under Third Circuit Rule 12(6), August 7, 1978
Before: ALDISERT, VAN DUSEN and HUNTER,
Circuit Judges.

After considering the contentions raised by appellant, to-wit, that (1) appellant suffered prejudice because of his joinder for trial with his co-defendants; (2) appellant was prejudiced by the closing opinion of the prosecuting attorney; (3) appellant was not properly identified by the prosecution; (4) the district court erred in refusing to grant a mistrial, or, in the alternative, to strike the testimony of two government agents where the prosecution failed to supply defense counsel with the grand jury testimony of each of the agents pursuant

Appendix "A"—Judgment Order.

to the Jencks Act; and (5) the district court erred in denying the defense motion to strike the testimony of a government witness, where multiple "debriefings" of the witness were tape-recorded and the recordings destroyed by the government in violation of the Jencks Act; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

ALDISERT,
Circuit Judge.

Attest:

M. Elizabeth Ferguson
Acting Clerk

DATED: August 7, 1978

Certified as a true copy and issued in lieu of a formal mandate on September 13, 1978.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit

APPENDIX "B"**Order Denying Petition for Rehearing****UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 78-1289

UNITED STATES OF AMERICA,

vs.

PATTON, JOHN a/k/a Buncie
John Patton,*Appellant.*

(D. C. Criminal No. 76-141-1)

Present: ALDISERT, VAN DUSEN and HUNTER,
Circuit Judges.

August 17, 1978

1. Appellant's Petition for Rehearing before original panel;
2. Copy of Judgment-Order entered August 7, 1978 in the above-entitled case. Judges Van Dusen and Hunter are requested to communicate with Judge Aldisert regarding this petition.

Respectfully,

enc.
mefM. ELIZABETH FERGUSEN,
Acting Clerk.

The foregoing Motion is DENIED.

By the Court,
ALDISERT,
Judge.

Dated: September 5, 1978

APPENDIX "C"**18 U.S.C.A. §3500**

18 U.S.C.A. §3500 provides:

... (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . .

(d) If the United States elects not to comply with an Order of Court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof, as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means -

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
- (2) a stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
- (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury. . .